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IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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I. The State Of Israel "Owned" A Majority Of The Shares Of And Had A Majority "Ownership Interest" In DSB.

A. Respondents and the United States Fail to Refute that the Plain Meaning of "Owned" and "Ownership Interest" in § 1603(b)(2) Encompasses Israel's Majority Ownership Stake in DSB.

Respondents and the United States devote a great deal of energy attempting to demonstrate that "own" – on its face a general term with a variety of usages – is a word that can only be understood to mean direct ownership or legal title. They fail, however, to cite a single authoritative source for that proposition. Rather, their arguments rest on a discussion of certain "bedrock" principles of corporate law relating to the separateness of corporate entities and rules concerning veil piercing and limitations on liability – precepts that have no relevance to the question of statutory interpretation at issue. Similarly, they do not even try to controvert DSB's showing that "ownership interest" is a broad term, commonly used to describe the interest a corporate shareholder has in the corporation's subsidiaries, but instead rely on inapplicable canons of statutory construction to urge that the plain meaning of the term should be ignored.

1. A Shareholder of a Parent Corporation "Owns" the Shares of a Subsidiary Corporation.

It is beyond dispute that the word "own," and similar words such as "ownership" or "owned," are frequently used in formal legal contexts to describe the connection between a corporation's shareholder and the corporation's subsidiary: that is, a corporate shareholder is said to "own" the shares in or property of a corporation's subsidiary or to be a "shareholder" of the subsidiary. This Court has so used these words in such diverse contexts as: (a) trademarks, in a case in which a subsidiary's trademark was held to have been "owned by" the parent corporation (*K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292, 298-99, 318-19 (1988)); (b) the law of standing, in which a parent corporation was held to have standing to bring a tax case on behalf of its subsidiary's subsidiary, an entity in which it

was, according to the Court's usage, a "shareholder" (*Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 339 (1990)); (c) a personal injury case on the high seas, in which stockholders were held to be the "owners" of their corporation's vessel, enabling them to assert certain limited liability protections available to vessel owners (*Flink v. Paladini*, 279 U.S. 59, 63 (1929)); (d) a securities and antitrust case, in which a third-tier subsidiary was equitably estopped from bringing an action as to which estoppel barred its great grandparent corporation, an entity described as having "ownership of about 98.3% of the outstanding stock" of the third-tier subsidiary (*Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703, 706 (1974)); and (e) an antitrust case, in which a parent and its subsidiary were held to be incapable of entering into an antitrust conspiracy because they are "subject to common ownership" (*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (1984)). DSB Br. 21-23.

Plainly, the word "own" and similar words may be and frequently are appropriately used to refer to the interest of a shareholder of a corporation in a corporate subsidiary or its assets. Respondents' attempt to distinguish these authorities on the ground that they involved veil piercing, *see* Resp. Br. 19, is in error. None of these decisions involved fraud or reaching back in any way to hold shareholders responsible for corporate liabilities. *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("veil piercing" is doctrine under which "the shareholder [is] held liable for the corporation's conduct when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf"). Nor was this the purpose for which these cases were cited. DSB readily agrees that it is a separate entity from both its parent corporations and the State of Israel, and there is no basis to "pierce the corporate veil" to hold DSB's parent or the State liable for any alleged tort committed by DSB. *See* DSB Br. 24. Rather, the purpose of citing these cases is to establish that the ordinary meaning of the words "shares . . . *owned* by a foreign state" in § 1603(b)(2) encompasses the State of Israel's

ownership of DSB's shares through the State's ownership of DSB's parent entities.

None of the arguments presented by respondents or the Solicitor General rebut this point. Their briefs go to great lengths (Resp. Br. 16-19; U.S. Br. 10-12) to establish that DSB is a "separate entity" from its parent corporations – which, as noted above, is undisputed. The fact that DSB is a separate entity, however, has nothing to do with whether its shares were "owned" by the State.[1]

DSB is not arguing that "corporate separateness is meaningless or may be disregarded on a routine basis." Resp. Br. 20. When faced with the issue of whether a corporate shareholder (or parent corporation) may be held liable for the actions of a subsidiary, this Court, like the highest courts of all fifty states, generally resists such a result, because Congress is presumed to legislate in light of the "bedrock" principle that a shareholder is not liable for corporate debts. *Bestfoods*, 524 U.S. at 62.[2] This "bedrock" principle of limited liability, however, does not control the meaning of the word "owned" in § 1603(b)(2). The plain meaning of this word is established by its usage by this Court and numerous others, *see* Dole Br. 17-19, to encompass shareholder ownership of a corporation's assets or subsidiaries.

In its initial brief, DSB noted that the words in § 1603(b)(2) at issue here – "owned" and "ownership interest" (the latter term is discussed below) – are not defined in the statute and therefore should be construed in accordance with their "'ordinary or natural meaning.'" DSB Br. 25 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). In response, the Solicitor

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1. Respondents' reliance on case law expounding the separate entity doctrine, *see* Resp. Br. 17-18, is particularly odd, in view of Congress' explicit decision to part from that doctrine and bring corporate entities owned by foreign states squarely within the reach of the statutory scheme. *See* 28 U.S.C. § 1603(b)(1); DSB Br. 36-38; *accord* Resp. Br. 36 ("Congress did not intend to adopt the separate entity rule").

2. It is for this reason that the FSIA provides that the assets of an agency or instrumentality will be available to enforce a judgment only against that particular agency or instrumentality. *See* U.S. Br. 11 n.2.

General asserts that "'[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal meaning*.'" U.S. Br. 13 (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring)); *see also* Resp. Br. 14. But respondents and the Solicitor General fail to show that the exclusive "legal meaning" of the word "owned" is the narrow concept of title such as they propose, or that the broader usage of this word by this Court and others is in error. In fact, the word "owned," standing alone, plainly encompasses both a narrow and a broader concept.

The broad "legal meaning" of the word "owned" is powerfully illustrated by Congress' repeated use of the word in respondents' long list of federal statutes using the phrase "directly or indirectly owned" or similar formulations involving the words "owned" or "ownership" and "directly" and "indirectly." Resp. Br. 15 n.6; *see also* U.S. Br. 15. These statutes demonstrate that the words "owned" and "ownership" encompass indirect as well as direct ownership. The fact that in the FSIA Congress included neither the word "directly" nor the word "indirectly" does not establish that "owned" means "directly owned." To the contrary, the use of the word "owned" without any limiting adverb suggests that its breadth should not be artificially restricted by a judicial interpretation that inserts the modifier "directly," when Congress chose not to do so. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

2. The State of Israel Held an "Ownership Interest" in DSB.

DSB has demonstrated that "ownership interest" is a term with a broad and well established meaning that clearly encompasses the nature of the interest that the State of Israel had in DSB. DSB Br. 25-30. Therefore, even if the State of Israel cannot be said to have owned the "shares" of DSB, the State had a majority "ownership interest" in the company that satisfies this alternative requirement of § 1603(b)(2).

The Solicitor General dismisses this argument in a single footnote, contending that the State of Israel could not have had an "ownership interest" in DSB because DSB issued "shares" that were owned by its parent corporation and thus did not have any "other ownership interest" that could have been owned by the State. U.S. Br. 17 n.7. This linguistic sleight of hand simply disregards the plain meaning of the term "ownership interest." DSB has provided numerous examples of the use of the term "ownership interest" to describe the nature of the interest that a shareholder or grandparent corporation has in tiered corporate subsidiaries in which the shareholder or grandparent corporation has no direct share ownership. DSB Br. 26-27. Neither the Solicitor General nor respondents address these authorities. And the Solicitor General offers no rationale whatsoever why the term "ownership interest" in the FSIA should not be construed as it is ordinarily used.

In attempting to avoid the plain meaning of the term "ownership interest," respondents place principal reliance on the assertion, also articulated by the Ninth Circuit below, that the ordinary reading of the term would render superfluous the antecedent statutory reference to "shares." Resp. Br. 21-22. This argument concedes the broad meaning of "ownership interest" urged by DSB; there would otherwise be no need to invoke a limiting canon of construction. DSB refuted the superfluity analysis in its initial brief. DSB Br. 40-41. Respondents notably fail to address DSB's rebuttal.

Respondents also allude to the canon *ejusdem generis* ("of the same kind"). Resp. Br. 21. That canon, however, like the related presumption against superfluousness, *see* DSB Br. 40, has no utility where it would result in a "depart[ure] from the primary rule that words are to be taken in their ordinary sense." *Danciger v. Cooley*, 248 U.S. 319, 326 (1919); *see also United States v. Turkette*, 452 U.S. 576, 581 (1981); *Harrison v. PPG Ind., Inc.*, 446 U.S. 578, 588 (1980); *United States v. Powell*, 423 U.S. 87, 91 (1975). Since neither respondents nor the Solicitor General present any authority for a more restrictive

definition of "ownership interest," the *ejusdem generis* canon cannot be used the trump the plain meaning of that term.[3]

In any event, application of the canon should not lead to a contrary result. If the words "ownership interest" are to be limited or construed in light of the more specific word "shares," "ownership interest" must include any kind of ownership akin to share ownership. For the reasons already noted, "share ownership" should be understood to include indirect as well as direct share ownership. *See* 1-4, *ante*. But if that is incorrect, indirect share ownership would seem to be a type of ownership as closely analogous to direct share ownership as one could imagine and would therefore be encompassed by the term "ownership interest." *See* DSB Br. 40-41; Dole Br. 22-23.

Respondents and the Solicitor General suggest that allowing indirect ownership would create uncertainty and complexity in ascertaining the existence of a majority interest. Resp. Br. 22; U.S. Br. 20. Percentage ownership interest, however, is derived by multiplying the percentage ownership at each corporate tier, an exercise in grade school arithmetic. For example, if the foreign state holds 80% of the shares of a corporation that in turn holds 80% of the shares of a subsidiary, the foreign state's ownership interest in the subsidiary is 64% (80% x 80%). Alternatively, if the same parent corporation's stake in the

3. Moreover, *ejusdem generis* is inapplicable where a specific reason can be inferred why the legislature may have included a single specific word preceding a more general term. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983) (declining to apply canon to limit breadth of "minerals," as Congress could have included antecedent reference to "coal" due to its special treatment in other statutes); *Norfolk & Western Ry. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 129 (1991) (declining to apply canon to limit breadth of "law," as Congress could have included antecedent reference to "antitrust laws" to prevent application of canon that implied repeals of antitrust laws are disfavored). In the case of the FSIA, Congress may have thought it necessary to reference "shares" to make clear that corporations could be eligible for "agency or instrumentality" status notwithstanding the pre-FSIA rule that they were "separate entities" that could not assert sovereign immunity status. DSB Br. 36-38.

subsidiary were only 50%, the foreign state's ownership interest in the subsidiary would be 40% (80% x 50%). The foreign state would hold a majority ownership interest in the first situation but not in the second. Application of the plain meaning of "ownership interest" is entirely compatible with a preference for "administrable, predicable, bright-line [jurisdictional] rule[s]." Resp. Br. 23.[4]

Respondents criticize DSB's discussion of the nature and degree of Israel's oversight and control over the company under the Government Companies Law (DSB Br. 8-14) as an effort "to smuggle the FSIA's 'organ' test into the entirely separate 'ownership' inquiry of Section 1603(b)(2)." Resp. Br. 24. This discussion, however, serves simply to illustrate how bizarre and illogical it would be to conclude that the State of Israel did not have a majority ownership interest in DSB on this record. Under the Government Companies Law, by virtue of the State's majority ownership interest in DSB through a tiered corporate structure, the State exercised substantial control over DSB, essentially the same as that it would have had if DSB had been directly owned by the State; and the State had far reaching rights to supervise and manage DSB's affairs well beyond the rights of a majority direct shareholder in a U.S. corporation. DSB Br. 28-30.[5]

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4. There is no suggestion in their briefs that respondents or the Solicitor General disagree with DSB's calculation of Israel's varying percentage ownership interest in DSB during the relevant time period. *See* DSB Br. 5-7.

5. Respondents devote the first four pages of their argument (Resp. Br. 10-14) to a critique of the recursive interpretation of § 1603, which holds that an entity majority owned by a foreign state is an "agency or instrumentality of a foreign state" (per § 1603(b)(2)) and thereby a "foreign state" (per § 1603(a)), making any entity majority owned by that "foreign state" an "agency or instrumentality of a foreign state" (per § 1603(b)(2)). The discussion is beside the point, as DSB does not rely on the recursive theory. DSB Br. 39 n.15.

B. Respondents' Proffered Policy Arguments Apply As Much to a Corporation Directly Owned by a Foreign State As to Its Indirectly Owned Subsidiaries and In Any Event Are Unpersuasive.

Respondents present a host of reasons why they believe Congress should not have included a corporation indirectly owned by a foreign state in the Act's definition of "foreign state." These arguments, however, apply equally to a corporation directly owned by a foreign state as to a majority-owned subsidiary and, accordingly, provide no basis to draw a line between the two. Since whether such a line should be drawn is the issue in this case, respondents' arguments are irrelevant and, in any event, do not withstand analysis.

Respondents assert that DSB is a "commercial mining enterprise[] whose operations are far removed from the core concerns of the FSIA." Resp. Br. 2. While DSB is a commercial mining enterprise, the same is true of its parent entity (although its parent might be more accurately described as a mining and chemicals enterprise). Thus, the fact that DSB is involved in mineral extraction does not distinguish between it and its directly state-owned parent. Nor is it true that a mining company is "far removed from the core concerns" of the Act. Insofar as the Act addresses commercial activities of foreign state entities, its core concern is to provide certain procedural protections, such as a right to a federal forum and a non-jury trial, when legal claims are asserted against them in the United States. 28 U.S.C. §§ 1330(a), 1441(d); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983); *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 875-78 (2d Cir. 1981). The legislative history reflects the Congressional determination that a "mining enterprise" owned by a state, like a state-owned trading enterprise, shipping line, airline or steel company, be accorded the protections of the Act. DSB Br. 33-34 (quoting H.R. Rep. No. 94-1487 at 16).

Respondents point to the fact that under "prevailing international [law] . . . foreign state-owned entities . . . are not entitled to sovereign immunity based on direct foreign ownership." Resp. Br. 26; *see also* U.S. Br. 18-19. Yet Congress

endorsed a very different approach when it allowed state-owned corporations to assert "agency or instrumentality" status under the Act. The international rule provides no basis to distinguish between an entity directly owned by a foreign state and its subsidiary, as neither would be an "agency or instrumentality" under the international rule. Moreover, it is illogical to rely upon a rule Congress rejected to interpret the scope of the Act.[6]

Respondents suggest that the Act would more closely reflect the practice in other countries if FSIA status turned on "performance of governmental purpose, not tiered ownership." Resp. Br. 27. Of course, "governmental purpose" does not distinguish between directly owned corporate entities and their subsidiaries and is therefore irrelevant to the issue at bar. More fundamentally, here too Congress specifically rejected such an approach, allowing any and all state-owned commercial entities to assert "agency or instrumentality" status under the Act.

Respondents dubiously suggest that corporate entities assert FSIA status "to the detriment of U.S. citizens and of U.S. companies that must compete with these foreign entities." *Id.* 29. Allowing "agencies or instrumentalities" to remove an action from state to federal court (28 U.S.C. § 1441(d)) does not injure U.S. citizens or U.S. companies. In most commercial cases (and certainly most commercial cases involving U.S. citizens), the "agency or instrumentality" will *not* be able to assert sovereign immunity (*id.* § 1605) and the case will proceed in federal court. In a narrow category of commercial cases, typically those *not* involving U.S. plaintiffs, the required "direct effect in the United States" may be absent, *see Verlinden*, 461 U.S. at 497 n.23, and the claim against the agency or

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6. Congress intended to conform to international practice in adopting the restrictive theory of sovereign immunity, but rejected a particular aspect of such practice in allowing state-owned commercial enterprises to assert "agency or instrumentality" status under the Act. *See* U.S. Br. 18-19 ("foreign states do *not* grant sovereign-immunity-based protections of any kind to government-owned corporations"). The over-broad assertion that the Act was intended to "align[] U.S. law with international practice," Resp. Br. 26, elides this distinction.

instrumentality will be dismissed for want of subject matter jurisdiction. Nothing in this framework creates either a substantial burden on U.S. citizens or U.S. corporations, or provides any basis to distinguish between entities directly and indirectly owned by foreign states. In any event, if and to the extent there is a detriment to U.S. citizens or businesses, Congress has decided that in balancing such interests with its goals in enacting the FSIA, the statutory objectives take precedence.

Respondents assert that the "FSIA eliminates personal jurisdiction principles of state long-arm statutes," and "prohibits jury trials" with respect to claims against foreign states and their agencies or instrumentalities. Resp. Br. 31, 32. These concerns, whatever their merit, have no bearing on whether the statute should be interpreted to distinguish between parent corporations and their subsidiaries.

Respondents assert that the FSIA should not offer immunity to a corporate entity that does not have immunity under the laws of the foreign state in which it is incorporated. *Id.* 35. Again, however, this consideration does not differentiate between government-owned corporations and their subsidiaries, since, typically, neither entity is entitled to sovereign immunity under the laws of foreign states. *See* U.S. Br. 18-19. Similarly, the FSIA provides protection to "political subdivisions" – such as cities and village governments – notwithstanding the fact that such municipal entities have no sovereign immunity in foreign jurisdictions. Respondents' contention is a critique of the breadth of the FSIA, not an effort to interpret its terms. Respondents' other arguments are similarly off-base.[7]

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7. Respondents assert that a state "'imparts none of its attributes of sovereignty'" to an entity in which it owns shares, Resp. Br. 17 (quoting *Briscoe v. Bank of Ky.*, 36 U.S. 257, 325-26 (1837)), but that is the separate entity rule the FSIA specifically rejects – as respondents elsewhere concede. *Id.* 36. Respondents' suggestion that "foreign corporations . . . *directly* owned by a foreign government may have a 'hidden identity,'" *id.* 29-30, is merely a critique of the Act. Finally,

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The Solicitor General favorably cites an American Bar Association report, *see* U.S. Br. 21, but in that report a group of distinguished practitioners and law school professors concluded that inclusion of tiered entities as agencies or instrumentalities would best serve "the purposes and structure of the Act." Working Group of the American Bar Ass'n, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 522 (2002). Contrary to the implication of the Solicitor General's citation, the report recommends that the Act be amended to clarify this point due to the uncertainty created by the conflict in the case law this Court granted *certiorari* to resolve – not because the report's authors determined that the Act as currently drafted excludes tiered subsidiaries. *Id.*

Nor is there merit to the Solicitor General's assertion that DSB is asking this Court to "thrust itself into a policy-making function that does not ordinarily reside in the Judicial Branch." U.S. Br. 20. DSB is merely asking the Court to confirm the judgment of the vast majority of lower courts that have considered the issue and interpret the words "owned" and "ownership interest" in the Act in accordance with their ordinary meaning, which is in harmony with the policies underlying the statute.

II. The Relevant Period For Determining An Entity's FSIA Status Includes The Time Of The Acts At Issue.

A. The "Plain Meaning" Arguments Presented by Respondents and the Solicitor General Are Meritless.

The first heading of Point II of the United States' brief asserts that "[t]he plain terms of the FSIA grant protection to those entities that satisfy the FSIA's definitional requirements at the time of suit." U.S. Br. 23. Yet the discussion beneath the heading skips over the "plain terms" of the Act and proceeds to a

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respondents decry the Act's provision of federal court jurisdiction over "garden-variety tort and contract claims," *id.* 41, but this complaint, too, is more aptly addressed to Congress and provides no basis to distinguish between directly owned and subsidiary companies.

supposed "hornbook principle governing jurisdictional statutes" that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" U.S. Br. 24 (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)); *see also* Resp. Br. 44. Notably, no hornbook is cited for this proposition. Instead, the Solicitor General and respondents rely upon *Mollan* and several other cases, all of which concern diversity jurisdiction.

It is indeed well established that diversity must exist at the time an action is commenced for a federal court to exercise diversity jurisdiction. But these cases do not articulate a generally applicable principle that governs all fonts of jurisdiction. Federal question jurisdiction, for example, has nothing to do with the status of the parties on the date that an action is commenced. Rather, it turns on whether an action is one "arising under" the Constitution, laws, or treaties of the United States. U.S. Const., Art. III, § 2. The existence of such jurisdiction depends on the *issues* in the case, and whether they raise a federal question, which turns on whether some event – often a *past* event – gives rise to a claim or defense grounded in federal law. *See Verlinden*, 461 U.S. at 494 (well pleaded complaint rule does not govern scope of Article III "arising under" jurisdiction).

It is of particular relevance that federal question cases do not turn on the status of the parties on the date an action is commenced, because the constitutional basis for the exercise of subject matter jurisdiction in FSIA cases is the "arising under" clause in Article III. *Id.* at 493. Since "arising under" jurisdiction turns on the presence of a federal question rather than the status of the parties at the time an action is brought, the fact that DSB is no longer majority owned by the State of Israel has no bearing on whether a court has jurisdiction over this action under the FSIA. There is no "hornbook" or other principle of law to the contrary.[8]

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8. The implementing jurisdictional statute sheds no further light on the timing issue, as it simply incorporates the definition of "foreign state" in 28 U.S.C. § 1603, which is the focus of this case. *See* 28 U.S.C. § 1330(a).

In a nod in the direction of a "plain language" argument, the Solicitor General notes that the operative language of § 1603(b)(2) uses the word "is" but provides no support – other than an irrelevant quotation from a diversity case – that "is" refers to the date an action is commenced. U.S. Br. 24 n.13. Indeed, the Solicitor General forthrightly acknowledges the correctness of petitioners' observation (DSB Br. 42-43; Dole Br. 41-42) that the FSIA elsewhere uses the present tense to refer to events that occurred at the time of the circumstances giving rising to the lawsuit. U.S. Br. 24 n.13.

Respondents press the plain language argument more forcefully, focusing their attention on Congress' use of the word "is." However, they too fail to address the authorities petitioners have cited which show that the use of the present tense in a federal statute does not necessarily refer to the date on which a suit is commenced and, in fact, frequently refers to past or future time periods. *See* Dole Br. 40-41 (quoting and citing legislative drafting references, including the *House Legislative Counsel's Manual on Drafting Style*); DSB Br. 41-43 (quoting grammar book and case law). Instead, respondents cite a number of other cases (*see* Resp. Br. 42-43), most of which have no relevance to the issue at bar.

In four of the cases, this Court held that a federal statute that uses a verb in the past or past perfect tense should be interpreted to refer to a past event.[9] Quite obviously, the fact that past tense verbs from other statutes have been interpreted

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9. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (statute's reference to "sentence was imposed" and "has spent in official detention" implies that imposition of sentence and time spent in official detention occurred in the past, prior to the calculation of jail time credit); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111 (1983) (statute's reference to "who has been convicted" refers to conviction that occurred in the past); *Barrett v. United States*, 423 U.S. 212, 216 (1976) (statute's use of "has been" shipped in interstate commerce means event must have occurred in the past); *Otte v. United States*, 419 U.S. 43, 49 (1974) (statute's use of "performed any service" in defining an employee refers to former employees who "performed" the service in the past).

to refer to past events sheds no light on the issue here. Inexplicably, respondents cite three other cases in which this Court construed present tense verbs in a federal statute as referring to events occurring in the past, prior to the date a litigation is commenced, an interpretation that supports DSB's position that present tense verbs do not necessarily refer to the date an action is commenced.[10] In all of these cases, the Court examined Congress' choice of verb tense, together with the rest of the statutory language, its context and the legislative purpose. In some, the Court found the tense of the verb to be significant, *see, e.g., Barrett*, 423 U.S. at 217 ("statute's pattern is consistent and no unintended misuse of . . . tense is apparent"); in others, the verb tense was notably unhelpful, *see, e.g., Scarborough*, 431 U.S. at 571 ("Congress' choice of tenses is not very revealing"). Altogether, these cases provide no support for respondents' argument.

Respondents also cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), which construed a Clean Water Act provision under which a citizens suit may be commenced against any person "alleged to be in violation of" the Act if the violation is not corrected within 60 days after the plaintiff has given a pre-suit notice. *See* 33 U.S.C. §§ 1365(a)(1), 1365(b)(1)(A). *Gwaltney* held that, by using the phrase "alleged to be in violation" and giving the alleged violator an opportunity to avoid a suit by coming into compliance prior to commencement of suit, Congress evidenced

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10. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (civil rights statute's reference to "fail or refuse to hire" involves the use of "operative verbs" in the "present, active tense" to refer to adverse employment decisions in the past, prior to initiation of employment discrimination litigation); *Scarborough v. United States*, 431 U.S. 563, 570 (1977) (statute's use of "receives, possesses, or transports . . . any firearm" refers to actions that occurred in the past, prior to indictment); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation*, 519 U.S. 248, 255 (1997) (construing "enters into a settlement" as referring to a settlement entered into in the past, prior to person's filing for death benefits against the employer under the statute).

an intent that the alleged violation exist at the time the action is commenced. 484 U.S. at 60. There is no comparable language or structural device in the FSIA that suggests such a result here.

Finally, respondents point to *Stafford v. Briggs*, 444 U.S. 527 (1980). The statutory language in that case established venue in a mandamus action in which "a *defendant is* an officer or employee of the United States or any agency thereof *acting* in his official capacity or under color of legal authority. . . ." 28 U.S.C. § 1391(e) (emphasis added). Such language focuses on the status and actions of the *defendant*, a status that exists only upon the filing of a complaint. Nothing in the FSIA, however, requires that an agency or instrumentality of a foreign state be owned by the foreign state on the date that an agency or instrumentality is named as a defendant. Moreover, in reaching its conclusion the Court in *Stafford* discussed the purpose, structure and Congressional intent of the statute and noted only that the sentence at issue can "reasonably be read as describing the character of the defendant at the time of suit," 444 U.S. at 535, not that such a reading is compelled by the use of the present tense alone.

Respondents seek to bolster their argument based upon the FSIA provisions pertaining to service of process and execution of judgments upon an "agency or instrumentality." *See* Resp. Br. 45; 28 U.S.C. §§ 1608(b), 1610. Yet nothing in these provisions suggests that an entity must be owned by a foreign state at the time suit is commenced. Indeed, the rules for service of process are analogous to rules of service on any private corporation in the United States, which is typically effected by service on the corporation's officers or directors, *cf.* 28 U.S.C. § 1608(b)(2) (service on officer or managing agent), or on the Secretary of State of the state in which the corporation is organized, *cf. id.* § 1608(b)(3)(A) (service "as directed by an authority of the foreign state or political subdivision").

There is no substance to respondents' suggestion that petitioners (and, by implication, the circuit courts that have unanimously ruled against respondents' position on the

timing issue) are attempting to rewrite § 1603(b)(2) by changing "is" to "was" and adding the phrase "at the time of the acts upon which the complaint is based." Resp. Br. 43-44. The word "is" does not itself say whether a status must exist at the time of the acts giving to a lawsuit or at the time a lawsuit is filed. There would be nothing remotely unusual or ungrammatical about § 1603(b)(2) if it had said "is, at the time of the acts upon which the complaint is based, an organ of a foreign state, etc." Accordingly, DSB's argument does not turn on changing "is" to "was." It is of course true that the phrase "at the time of the acts upon which the complaint is based" does not appear in the statute – but neither does the phrase "at the time of the filing of the lawsuit." Since neither phrase appears in the text of the statute, the text alone does not resolve the timing issue. It is therefore appropriate to take into account the policies and objectives of the statute, as well as the general principle developed in connection with other immunity doctrines that immunity is not divested merely because of a change in status prior to the time a lawsuit is commenced.

B. The Policy and Other Non-textual Arguments Presented by Respondents and the Solicitor General Should Not Prevail.

Respondents assert that "[i]t would be difficult to think of a more dramatic expression by a government that its direct interest in a company has ended than privatization." Resp. Br. 46. The record is to the contrary. It was upon the privatization of DSB in the 1990s that the State of Israel required amendments to its corporate charter declaring that the State has "Vital Interests" in DSB and giving the State a Special State Share that continues to vest in the State extraordinary approval rights with respect to DSB's affairs. JA 107-08, 73-74; DSB Br. 7.

The American Bar Association report cited by the Solicitor General concludes that "actions of foreign states remain potentially politically sensitive even after the entity

is sold or otherwise loses its status as a foreign state or instrumentality" and for this reason concludes that the FSIA's "policies favor applying the statute . . . when the defendant was a foreign state or instrumentality either when the alleged violation [tort or other legal wrong] occurred or when the complaint is filed." *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. at 530. The Solicitor General disagrees with this conclusion, opining that "the United States has not encountered 'diplomatic friction' arising from post-privatization litigation." U.S. Br. 29. Of course, as the Solicitor General conceded in his brief in support of certiorari, *see* U.S. Br. 14 (May 2002), with the exception of a lone district court, every court that has reached the timing issue, including four federal circuits, has held that the protections of the FSIA remain in place with respect to pre-privatization conduct after an instrumentality's privatization. *See* DSB Br. 48. That no "diplomatic friction" has developed under a virtually uniform interpretation of the Act permitting former instrumentalities to invoke its protections hardly suggests that the same would be true if this Court were to adopt the opposite interpretation.[11]

The Solicitor General also opines that the "foreign state's interests in a suit against a *former* majority-owned corporation are likely to be . . . attenuated." U.S. Br. 28. Again, no support is given for this conclusion. One need look no further than the complaint in this action to discern why a foreign state might well retain a significant interest in the process and rules by which claims against a former instrumentality may be pursued. Respondents' pleading alleges that their exposure to DBCP caused them "serious

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11. Respondents err in suggesting (Resp. Br. 46 n.35) that the courts are split on the issue. With the exception of a lone district court decision, *Ocasek v. Flintkote Co.*, 796 F. Supp. 362 (N.D. Ill. 1992), the cases they cite do not address whether foreign state status at the time the cause of action arose would be sufficient to create FSIA jurisdiction. DSB Br. 48 n.20.

and permanent injuries," including sterility, cancer, birth defects, and miscarriages (JA 27); that industry scientists learned as early as 1958 that DBCP exposure caused "testicular atrophy" and adverse "liver, lung and kidney effects" (JA 28-29); that the industry manipulated the information submitted to the federal government in 1961 to register the pesticide without scrutiny of adverse health effects (JA 29); that the industry failed to warn agricultural workers who used the products of its dangers and failed to recommend use of safety devices when handling the product (JA 32); that even after the U.S. Environmental Protection Agency banned the product the industry continued to promote its use in Central America (JA 33); and that in hearings before a Senate Committee, Senator Leahy excoriated the industry, stating that "[t]he tale of DBCP is an appalling one" (JA 34).

In fact, DSB (and its BCL subsidiary) have little or nothing to do with any of these allegations (which remain unproven at this stage of the litigation) and were not even named as direct defendants in this suit. But what if DSB had been the sole or principal manufacturer of DBCP, or the entity that initially researched its health effects, or that handled its early registration with the U.S. government, at a time it was majority-owned by Israel and subject to the oversight regime reflected in Israel's Government Companies Law? In such circumstances, it would likely have been a prime target of the plaintiffs' quest for an adverse judgment, and Senator Leahy's public condemnation. One can easily imagine, were those the facts, that the State of Israel – or any similarly situated foreign state – might have a strong interest in how the American judicial system adjudicates such claims. It might, for example, have significant concerns as to how a remote state court jury would adjudge its conduct during the time period in which it owned the defendant, or how the defendant's association with the foreign state might affect

the adjudication of the claims.[12] Thus, the lower courts and American Bar Association working group are clearly correct in concluding that suits against entities formerly owned by a foreign state fall within the class of lawsuits that the FSIA was enacted to address, since they require a court in this country to "'judg[e] the acts of another nation.'" DSB Br. 44 (quoting *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993)).[13]

Under other immunity doctrines – such as sovereign immunity, the qualified immunity of government employees, diplomatic immunity and the absolute immunity of judicial officers – immunity in existence with respect to alleged conduct is not lost upon a change in status of the potential defendant. DSB Br. 46-47; Dole Br. 43-45. Respondents and the Solicitor General assert that the timing rule for foreign sovereign immunity should be different from the other immunity doctrines because they are rooted in the common law rather than statute. Resp. Br. 48; U.S. Br. 26. No basis is offered, however, as to why this consideration warrants a different timing rule. Nor is there anything in the text or legislative history of the FSIA, which codified the common law doctrine of foreign sovereign immunity, that suggests

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12. Add to this hypothetical, as in fact happened in this case, that essentially identical claims have been asserted against the foreign state instrumentality in almost a dozen lawsuits brought in separate county courts in Texas, Louisiana and Hawaii, and the foreign state might be expected to have a very strong interest in a right to the more uniform and consistent forum provided by a federal non-jury trial.

13. The suggestion that "that concern is already addressed by the act of state doctrine" (Resp. Br. 47) ignores the Congressional determination to enact the FSIA precisely because that doctrine is inadequate to the task, since it is implicated only to the extent a suit requires "a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990).

Congress expected the courts to depart from the way in which the timing issue is handled under other immunity doctrines. Indeed, the Solicitor General essentially concedes as much, acknowledging that in certain circumstances foreign sovereign immunity might be asserted "based on past conduct by a *non*-natural person that has lost its sovereign status." U.S. Br. 26. Other status-based immunities have also been codified, *see, e.g.*, 19 U.S.C. § 1513 (immunity of customs officers), 42 U.S.C. § 14073 (immunity of employees of federal and state law enforcement agencies), without explicit language addressing the timing issue. Respondents' arguments, if applied to these statutes, would suggest that these statutory immunity protections would be lost if the status of the protected individual were to change before a judicial action is commenced. There is no reason to believe that Congress expected or intended such a result under these statutes or the FSIA itself.

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